SUPREME COURT OF THE UNITED STATES.

No. 416.

HIRAM BARNEY, COLLECTOR FOR THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

C. F. SCHMEIDER ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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a UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the judges of the Circuit Court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Circuit Court, before you, or some of you, between Hiram Barney, plaintiff in error, and C. F. Schmieder, *et al.*, defendants, in error, a manifest error hath happened to the great damage of the said Hiram Barney, plaintiff in error, as is said, and as appears by his complaint, we being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the law and custom of the United States, ought to be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this thirtieth day of November, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the United States the ninety-second.

[SEAL.] KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The within writ is hereby allowed, the defendants in error having waived in open court the necessity of any bond or security being given by the plaintiff in error on the issuing of this writ.

November 30, 1867.

SAM'L BLATCHFORD,
District Judge.

C. F. SCHMIEDER, *et al.*, def's in error,
vs.
HIRAM BARNEY, pl'ff in error.

b By virtue of the within writ of error, and in obedience thereto, I, Kenneth G. White, clerk of the Circuit Court of the United States for the southern district of New York, do hereby certify and return the jugdment and proceedings in the case, in the writ within mentioned, and that the following pages, numbered from one to twenty-eight, inclusive, contain a true and complete

transcript of the record and proceedings had in said court in the above-entitled case, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the 2d circuit, this 28th day of Dec'r, in the year of our Lord one thousaud eight hundred and sixty-seven, and of the independence of the said United States the ninety-second.

[SEAL.] KENNETH G. WHITE, *Clerk.*

[5-cent stamp.]

1 U. S. Circuit Court, southern district of New York.

C. F. SCHMIEDER and C. E. SCHMIEDER
vs.
HIRAM BARNEY.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The above-named plaintiffs come here into court, and by A. W. Griswold, their attorney, suggest and give the court now here to understand and be informed that the plaintiffs, by their attorney aforesaid complain of the defendant herein in a plea of trespass on the case. For that, whereas the plaintiff, on the 25th day of January, one thousand eight hundred and sixty-six, at the city of New York, in the southern district aforesaid, was indebted to the said plaintiffs in the sum of fifteen thousand dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of said defendant; and for other money by the said plaintiffs before that time paid, laid out and expended for the said defendant, and at the request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiffs. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when the defendant should be thereunto afterwards requested. And whereas also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted, together with the said plaintiffs, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid; and upon such accounting the said defendant then and there was found to be in arrear, and indebted to the said plaintiffs in the further sum of fifteen thousand dollars of lawful money as aforesaid. And being so found in arrear, and indebted to the said plaintiffs, the said defendant, in the consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there

2 faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant, (although often requested, &c.,) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof, to the said plaintiffs the defendant has hitherto wholly refused, and still does refuse, to the damage of said plaintiffs of fifteen thousand dollars, and thereof the plaintiffs bring suit, &c.

A. G. GRISWOLD, *Attorney for Plaintiffs.*

3 And the said defendant, by S. G. Courtney, his attorney, comes and defends the wrong and injury, &c., and says that he did not undertake and promise in manner and form as the plaintiffs have above thereof declared against him, and of this he puts himself upon the country, &c. Therefore, the issue above joined is ordered by the said court to be tried at a Circuit Court appointed to be held at the City Hall of the city of New York, on the 3d Monday of October, in the year 1866. And now, at this day, to wit, the 13th day of February, 1867, being as yet of the said October term, 1866, before the said justices, at the City Hall of the said city of New York, came the parties by their attorneys aforesaid; and the said circuit judge, before whom the said issue was tried, has sent hither his record had before him in these words, to wit:

Afterwards, that is to say, on the day and at the place within contained, before D. A. Smalley, esq., judge of the said Circuit Court, came as well the within-named plaintiffs as the said defendant, by their respective attorneys within mentioned; and the jurors of the jury, whereof mention is within made, being summoned also came, who, to speak the truth, the matters within contained being chosen, tried, and sworn upon their oaths, do say that the said defendant did undertake and promise in manner and form as the said plaintiffs have above thereof complained against him, and they assess the damages of the said plaintiffs by reason of the premises at the sum of eleven thousand and two and 84-100 dollars over and above their costs and charges by him about his suit in this behalf expended, and for those costs and charges, the sum of six hundred and thirty-eight and 46-100 dollars. Therefore, it is considered that the said C. F. Schmieder *et al.*, plaintiffs, recover against Hiram Barney, defendant, their damages, aforesaid, by the jurors aforesaid, in form aforesaid found, and also their costs and charges of increase by the court, now here adjudged to the said plaintiffs with their assent, which said damages, costs, and charges, in the whole, amount to eleven thousand six hundred and forty-one and 30-100 dollars.

Judgment signed this 30th November, 1867.

R. E. STILWELL, *Dep. Clerk.*

4 Endorsed: Vol. 7, p. 258. U. S. Circuit Court. C. F. Schmeider, *et al. vs.* Hiram Barney. Judgment roll. A. W. Griswold, pl'ffs att'y. Filed Nov. 30, 1867.

5 U. S. Circuit Court, southern district of New York.

Case and exceptions.

CHALES F. SCHMIEDER *et al.*
vs.
HIRAM BARNEY.

This was an action for money had and received, brought by the plaintiffs, merchants of New York, against the defendant, the collector of customs for the port of New York, to recover eleven thousand six hundred and forty-one 30-100 dollars, the amount of duty exacted of, and paid by, the plaintiff, under protest in writing, duly made and signed, on importation of Saxony woven dress goods, over and above the rate of 35 per centum ad valorem, being the difference between 35 per centum ad valorem and 30 per centum ad valorem, and 2 cents per square yard claimed by the defendant to have been the legal rate of duty under the tariff act of March 2nd, 1861, as increased by the act of July 14th, 1862, and alleged by the plaintiff to have been illegally exacted of them by the defendant, in his capacity of collector, as aforesaid, in the manner and under the circumstances hereinafter stated.

Upon the trial of said cause before the court and jury empannelled by the same, after issue joined, it appeared in evidence, among other things, that the plaintiffs were importers of usually called Saxony woven, or woven dress goods, which are manufacturers of worsted, and of worsted and cotton.

That such goods, being the same as the goods in question, had
6 been imported into this port by the said plaintiffs, and entered at the said custom-house as manufacturers of worsted and of worsted and cotton, and duty paid thereon, under said act of 1861, at 30 p. c., and after the passage of the act of 1862, at the rate of 35 per centum ad valorem, and had so been entered, and paid such duty under said acts up to the 20th day of March, 1863; but that from about that time, pursuant to a letter of instructions from Salmon P. Chase, Secretary of the Treasury of the United States, a copy of which is annexed, marked "A," the United States appraisers at New York, returned the said goods as "manufacturers of worsted," or as "manufacturers of worsted and cotton, similar to delaines, and not exceeding in value 40 cents per square yard;" but that they so returned them in pursuance of the positive instructions contained in that letter, though they were clearly of opinion that such goods were not "manufacturers of worsted nor manufacturers of worsted and cotton similar to delaines," and had not been, and are not yet, so considered by merchants engaged in the trade.

That the goods in question were imported into this port by the said plaintiffs at various times between the 24th day of June, 1863, and the 24th day of March, 1864, and entered at said custom-house as manufactures of worsted, and of worsted and cotton, at 35 per centum ad valorem, the same as they had theretofore been
7 entered, subject to the same duty previously exacted and paid.

or of "worsted and cotton yarn manufactures of worsted, five and woven upon a loom, using a colors in the weft of the fabric, market when they come from the and pressing.

That beside the delaines, ca and barege delaines, mentioned there are other fabrics, know amures, and coburgs, which ar being composed of worsted, or the gray or natural colo ton, then bleached, and which were bought, and s and domestic trade by these na 1861 and 1862.

The evidence showed that a ordinary delaine, and the Per goods and the mode of manufac delaines.

The evidence showed that der delaines, and barege delaines amures, and coburgs, are, and of 1861 and 1862, largely manu as abroad.

That the goods in question, i in this market and abroad, und or woven dress goods, and are and cotton, and composed of ti same purposes as delaines; bu acts of Congress, had never be

Whereupon, the plaint court to instruct the jury similar description, as us 1861, and the 9th section of the to "gray or uncolored goods," gray," and are not applicable the jury believed from the evi goods were not woven in the their verdict should be for the

The counsel for the defenda and the court was requested by

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The act of March 2nd, 1861, gray or uncolored, and on all o lar description, 25 per centum manufactures of worsted, &c.,

"On bunting, and on all stae

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nes, composed wholly or in part
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a matter of fact, whether the
"goods of a similar descrip-
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family of delaines which are
med "cashmers, coburgs, chal-
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additional duty of 2 cents per

that any decision was ever
upon the appeals in this suit
to have been made to him, (the

5 U. S. Circuit Court, southern district of New York.

Case and exceptions.

CHALES F. SCHMIEDER *et al.*
vs.
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This was an action for money had and received, brought by the plaintiffs, merchants of New York, against the defendant, the collector of customs for the port of New York, to recover eleven thousand six hundred and forty-one 30-100 dollars, the amount of duty exacted of, and paid by, the plaintiff, under protest in writing, duly made and signed, on importation of Saxony woven dress goods, over and above the rate of 35 per centum ad valorem, being the difference between 35 per centum ad valorem and 30 per centum ad valorem, and 2 cents per square yard claimed by the defendant to have been the legal rate of duty under the tariff act of March 2nd, 1861, as increased by the act of July 14th, 1862, and alleged by the plaintiff to have been illegally exacted of them by the defendant, in his capacity of collector, as aforesaid, in the manner and under the circumstances hereinafter stated.

Upon the trial of said cause before the court and jury empannelled by the same, after issue joined, it appeared in evidence, among other things, that the plaintiffs were importers of usually called Saxony woven, or woven dress goods, which are manufacturers of worsted, and of worsted and cotton.

That such goods, being the same as the goods in question, had
6 been imported into this port by the said plaintiffs, and entered at the said custom-house as manufacturers of worsted and of worsted and cotton, and duty paid thereon, under said act of 1861, at 30 p. c., and after the passage of the act of 1862, at the rate of 35 per centum ad valorem, and had so been entered, and paid such duty under said acts up to the 20th day of March, 1863; but that from about that time, pursuant to a letter of instructions from Salmon P. Chase, Secretary of the Treasury of the United States, a copy of which is annexed, marked "A," the United States appraisers at New York, returned the said goods as "manufacturers of worsted," or as "manufacturers of worsted and cotton, similar to delaines, and not exceeding in value 40 cents per square yard;" but that they so returned them in pursuance of the positive instructions contained in that letter, though they were clearly of opinion that such goods were not "manufacturers of worsted nor manufacturers of worsted and cotton similar to delaines," and had not been, and are not yet, so considered by merchants engaged in the trade.

That the goods in question were imported into this port by the said plaintiffs at various times between the 24th day of June, 1863, and the 24th day of March, 1864, and entered at said custom-house as manufactures of worsted, and of worsted and cotton, at 35 per centum ad valorem, the same as they had theretofore been
7 entered, subject to the same duty previously exacted and paid.

under the said acts of 1861 and 1862, but that said collector, the defendant, subsequently exacted from the plaintiffs a duty thereon, at the rate of 30 per centum ad valorem, and 2 cents per square yard, as goods of "similar description to delaines, not exceeding in value 40 cents per square yard."

That the plaintiffs duly protested in writing against the payment of duty at this last mentioned rate, claiming that said goods were not "delaines, or goods of a similar description to delaines," within the meaning of said acts of Congress of 1861 and 1862, but were "manufactured of worsted, or of which worsted was a component material, not otherwise provided for," liable, under said acts, to a duty of 35 per centum ad valorem, and no more; and from the decision of the collector, assessing duty at the rate of thirty per centum ad valorem, and two cents per square yard, they claimed to have appealed, in writing, to the Secretary of the Treasury.

The evidence as to that fact showed that the plaintiffs, by a written notice served upon the counsel for the defendant, due service whereof was admitted, gave the defendant notice to produce, upon the trial of the said cause, the original appeals made by the
8 plaintiffs to the Secretary of the Treasury from the decision of the collector, the defendant, as to the rate of duty exacted by him on said merchandise.

That the defendant failed to produce the said appeals on the said trial; whereupon the plaintiffs offered to prove that they deposited in the post-office, at the city of New York, written appeals addressed to Hon. S. P. Chase, Secretary of the Treasury, Washington, D. C., and paid the postage required by law thereon, copies of which appeals they produced, and were identified by the witness who mailed the originals.

The defendant objected to the evidence on the ground that the originals should be produced in evidence, or shown to be lost.

The court overruled the objections, and held the evidence admissable, to which ruling the defendant then and there excepted.

The evidence, then showed that said appeals were made within the time prescribed by law for that purpose, and in the manner above stated, and that no answer to said appeals had been received by said plaintiffs, or their attorneys.

The evidence on both sides showed that all delaines, cashmere delaines, mousseline delaines, and barege delaines, are fabrics composed of "worsted," and of "worsted and cotton," and woven in the gray or natural color of the "worsted," or "worsted
9 and cotton," and are often bought and sold in that condition.

Colored or printed delaines of every description are these "gray or uncolored" delaines sent by the purchaser or manufacturer, after weaving, to the printer, where the fabrics are bleached, and then dyed, colored, or printed, by passing them between rollers or cylinders, upon which a design is engraved to suit the fancy of the manufacturer or purchaser, the rollers being covered with coloring matter, which is impressed upon the fabric, and forms the pattern.

That the goods involved in this suit are made of "worsted yarn,"

or of "worsted and cotton yarn," the yarn being dyed in the skien, and woven upon a loom, using as many shuttles as there are different colors in the weft of the fabric, and that the goods are ready for the market when they come from the loom, with the exception of folding and pressing.

That beside the delaines, cashmere delaines, mousseline delaines, and barege delaines, mentioned in the act of Congress refered to, there are other fabrics, known to the trade as challies, Persians, amures, and coburgs, which are of similar description to delaines, being composed of worsted, or of worsted and cotton, and woven in the gray or natural color of the worsted, or worsted and cotton, then bleached, and then dyed, colored, or printed, and which were bought, and sold, and invoiced, both in the foreign and domestic trade by these names prior to, and since, the acts of 1861 and 1862.

The evidence showed that a challie was finer and lighter than the ordinary delaine, and the Persian heavier, but that the style of goods and the mode of manufacture were precisely similar to that of delaines.

The evidence showed that delaines, cashmere delaines, mousseline delaines, and barege delaines, as well as the challies, Persians, amures, and coburgs, are, and were prior to the passage of the acts of 1861 and 1862, largely manufactured in the United States, as well as abroad.

That the goods in question, in this case, have usually been known in this market and abroad, under the general name of Saxony woven, or woven dress goods, and are manufactures of worsted, or of worsted and cotton, and composed of the same materials, and used for the same purposes as delaines; but, at the time of the passage of said acts of Congress, had never been manufactured in the United States.

Whereupon, the plaintiffs' counsel contended and moved the court to instruct the jury that the phrase or words, goods of a similar description, as used in the 13th section of the tariff act of 1861, and the 9th section of the act of 1862, are limited and confined to "gray or uncolored goods," or "goods which are woven in the gray," and are not applicable to goods woven in colors; and that if the jury believed from the evidence in the case that the plaintiffs' goods were not woven in the gray, but were woven in colors, then their verdict should be for the plaintiffs.

The counsel for the defendant then offered the following prayers, and the court was requested by defendant to charge as follows:

1st. That the phraseology material in this suit is as follows:

The act of March 2nd, 1861, levies "on all delaines, cashmere, &c., gray or uncolored, and on all other gray or uncolored goods of a similar description, 25 per centum ad valorem."

"On bunting, and on all stained, colored or printed, and on all manufactures of worsted, &c., 30 per centum ad valorum."

The act of July 14. 1862, levies an additional duty "on all delaines, cashmere delaines, &c., and on all goods of a similar description, not exceeding in value 40 cents per square yard, two cents per square yard.

"On bunting, worsteds, and all other manufactures of worsted, five per centum ad valorem."

And that it is a question for the jury to determine, whether Congress intended in the second act, (act of 1862,) to cut out the restrictive terms "gray or uncolored," mentioned in the first sub-division of the first act, (act of 1861,) and whether Congress intended to include the terms "stained, colored or printed," mentioned in the second sub-division of the first act, under the generic term "delaines" in the first sub-division of the second act; or in other words, as heretofore charged by this court, "it becomes the province of the jury to consider the law, and under instruction of the court to determine what the law-making power intended by using the phraseology above set forth."

2nd. That if prayer first be denied, that then it is requested that the court will charge, as a matter of law, that sub-division 11, section 9, of the act of July 14, 1862, as follows: "on all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted, mohair or goat's hair, and on all goods of similar description," included all kinds of delaines, whether gray or
13 uncolored, or stained, colored or printed, and articles of similar description.

3d. That it is for the jury to find, as a matter of fact, whether the goods in question, known in trade as "goods of a similar description," to delaines, "stained, colored or printed."

4th. That the jury must find from the evidence that the term delaine is a generic term, covering a family of delaines which are known in trade as delaines, though termed "cashmers, coburgs, challies, Persians and amures," and that it is a question for the jury to find what good Congress meant (other than the species herein named as of the family of delaines) by the terms "goods of a similar description," unless Congress meant the kind of goods at issue in this suit.

5th. That the U. S. appraisers of the merchandise in question at this port, as appears from the evidence, found these goods to be manufactures of worsted and cotton, similar to delaines, under 40 cents per square yard," and that this report of the appraisers is final and conclusive as to the dutiable character and dutiable value of
14 the goods, there being no irregularity or fraud charged in the appraisal, and no re-appraisal being called for by the importers or plaintiffs, and therefore plaintiffs cannot recover in this action.

6th. That by the appraisers' report, as to the dutiable character or classification of these goods, they are clearly brought within the first sub-division of the act of July 14, 1862, as manufactures of worsted "of similar description to delaines," and being of such similar description they were chargeable with the additional duty of 2 cents per square yard.

7th. That there is no legal evidence that any decision was ever made by the Secretary of the Treasury upon the appeals in this suit from the collector of the port alleged to have been made to him, (th-

Secretary of the Treasury,) and therefore this suit cannot, for this reason, be maintained. (Sec. 5, of the act of March 3, 1857.)

8th. That there is no evidence that any appeal, as required by law, (sec. 5, act of March 3, 1857,) to be made to the secretary from the decision of the collector, was taken in this suit, and that therefore the plaintiffs cannot recover.

9th. That upon the law and testimony in this suit the defendant is entitled to a verdict.

(Requests denied, except as the charge was made.)

D. A. SM.

15 The court then charged the jury as follows:

The Judge's charge.

In the view that I take of this case it results entirely in a question of law, and I shall dispose of it, after stating, very briefly, my views upon the law, by directing the jury to find a verdict, the responsibility resting upon the court.

This action is brought to recover money paid for duties upon an article claimed to be of a similar description to delaines, and imported into this market by the plaintiffs. The defendant claims that they were liable to pay a duty of 30 per cent. ad valorem, and two cents a square yard, the value being under forty cents a square yard.

The plaintiffs claim that they are only liable to a duty of thirty-five per cent. ad valorem, making it 20 or 25 per cent. less than that claimed by the government, and insisted upon by the collector of customs.

The testimony taken on a former trial, has, with the consent of both sides, and the approbation of the court, been put in. It is very voluminous. It has not been read before this jury, nor was it
16 necessary that it should be, for it was delivered in the hearing of the court only a few days since, and is very fresh in its recollection. There is very little discrepency in the testimony.

The evidence on both sides shows that delaines are all manufactured in the grey—woven in the grey, or uncolored state—and that they are afterwards either dyed, colored, or printed, as the manufacturer or purchaser may desire. The evidence shows that these goods are woven in colors, and when they come from the loom were fit for the market, with the exception, perhaps, of pressing; that their generic term was "Saxony woven dress goods," or "woven dress goods," the name, perhaps, being taken from the country in which they were manufactured; that the goods in question were of the same material as delaines, and that they were used for the same purpose—ladies' and children's dresses.

The plaintiffs claim that these are not goods of a similar description as delaines, and the defendant insist that they are, and, therefore claims, under the act of 1861, as amended by the act of 1862, that they should pay a duty of 30 per cent. ad valorem, and two cents per square yard.

The testimony shows a diversity of opinion among importers, wholesale merchants, jobbers, and manufacturers, on this single question, whether they are, or are not, goods of a similar description to delaines.

All the evidence is clear and explicit, and there is no discrepency in the testimony on any point but this.

Then the enquiry is simply this: does the act of March 2nd, 1861, as amended by the act of July 14th, 1862, bring this class of goods within a similar description of goods as delaines?

Section 13, of the act of 1861, is as follows:

"On all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted, gray or uncolored, and on all other gray or uncolored goods of similar description, twenty-five per centum ad valorem."

Then the second clause of the act says:

"On bunting, and on all the above goods, when stained, colored or printed, and on all other manufactures of worsted, or of which worsted shall be a component material, not otherwise provided for, thirty per centum ad valorem."

It will be noticed that the language of the act confines these words "goods of similar description," to "goods composed wholly or in part of worsted, gray or uncolored, and on all other gray or uncolored goods of a similar description. "Therefore, it is clear that the act of 1861 would exclude goods of this description, for they are not gray or uncolored, but are woven in colors. It is shown conclusively, that delaines were woven in an uncolored state, and subsequently dyed or printed, according to the fancy of the manufacturer or purchaser.

The act of July 14th, 1862, purports to be an act increasing the duties on imports, and for other purposes.

And the first clause of section 9, which refers to this question reads thus:

"On all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted, wool."

Thus far it reads precisely as the section of the act of 1861, to which I have already refered. It then goes on, and makes a change in the phraseology:

"Mohair, or goats hair, and on all goods of similar description, not exceeding in value forty cents per square yard, two cents per square yard."

"On bunting, and on all other manufactures of worsted, or of which worsted shall be a component material, not otherwise provided for, five per centum ad valorem."

Now, it is claimed that this language extends the act of March, 1861, and authorizes them to apply it, if they can, by con-

19 struction, to goods that were not gray or uncolored, and not within the first clause of that section. The second clause of section 9, of the act of 1862, is precisely like the second clause of the act of March 2nd, 1861:

"On bunting, and on all other manufactures of worsted, or of which worsted shall be a component material, not otherwise provided for, 5 per centum ad valorem."

It is conceded that that would apply to these goods, if they do not come under this first class. The defendant, however, claims that they come under the first class, because the words "gray or uncolored" are omitted. The words "gray or uncolored," in the act of March 2nd, are applied to "delaines, cashmere delaines, barege delaines, muslin delaines, composed wholly, or in part, of worsted, gray or uncolored, and on all other gray or uncolored goods of similar description."

In the whole of the first section of the act of July, 1862, the words "gray or uncolored" are omitted. It applies to delaines exclusively. When it is applied to delaines, clearly the words "gray or uncolored" have no meaning, because the evidence shows that the manufacturers in this country, in England, and in continental Europe, manufactured them all gray or uncolored; therefore, they might, and have
20 been omitted. Why were they omitted in the second clause? I conceive it was because it was intended it should have a broader scope. They were evidently, in the first clause, intended to be confined to that class of goods called "delaines." In the second clause they use the words "all other manufactures of worsted, or of which worsted shall be a component part."

Now, did Congress at that time intend, not only to increase the duty, but to change the entire character of this section of the act of 1861? They left the second clause the same. In the first clause they have omitted the words "gray or uncolored," as applied to delaines, and also applied to goods of a similar description.

"On bunting, and on all other manufactures of worsted, or of which worsted shall be a component material, not otherwise provided for, five per centum ad valorem."

That is not changed. If these words were left out, it does not impair the sense, because it embraces everything.

The act of 1862 says:

"On bunting, and on all other manufactures of worsted, or of which worsted shall be a component material."

That embraces everything stated in the first act, and may embrace something more. Therefore this is broader than the others.
21 It is conceded that these goods may come under the second act, which would make it 35 per cent., I think.

The act of 1862 did not change the act of 1861, when they used the words "goods of a similar description;" and it was intended that they should have the same meaning in the act of 1862 as they had in the act of 1861.

If the legislature intended to impose an additional duty in any way, they should have expressed it in clear and intelligible language, so that it could be well understood. Is it not clear there is no fair ground to suppose that they intended to make any interpolation in the act of 1862 further than to increase it 5 per cent. on certain classes of goods, and two cents per square yard upon another certain class of goods—delaines, and other goods of that family, but known in trade by a different name—and 5 per cent. ad valorum upon the other?

Another argument to sustain that view is, that the act of 1864 strikes out all these qualifications, and embraces these goods, in general terms, as goods manufactured of wool or worsted, or of which wool or worsted are component parts, and classes them "dress goods."

If Congress had supposed they had it before, is it probable
22 they would have made another change? The court is now disposed to agree with the first construction given to it, that these words, "goods of a similar description," apply to goods of the generic term of delaines, because there are goods in the market of the family of delaines, not known as such in the trade—Persians, challies, coburgs, for example, which are more frequently sold under the name of Persians, challies, and coburgs, than under the name of delaines.

This language, then, is fully satisfied by taking the view the court has done.

I am satisfied that the act of 1862 does not, by any fair rule of construction known to the court, warrant it in saying that the words "goods of a similar description," were intended to be extended beyond what they were in the act of 1861, which clearly confined them to goods woven, gray, and uncolored, and afterwards printed or dyed.

I think, therefore, that the construction given to it by the Secretary of the Treasury, in his letter of 20th of March, 1863, is erroneous, and the one first given to it by the Custom-house department in New York, was the true one, and ought to have been followed.

The verdict ought to be for the plaintiffs.

23 The counsel for the defendant then and there duly excepted to the denial of the court to grant the requests and prayers offered by the defendant, taking such exception to such denial as to each and every prayer offered; and defendant's counsel also excepted to so much of the charge of the court as was inconsistent with the prayers and requests of the defendant, and especially excepted to that part of the charge being the close thereof, and in the words, as follows:

"I am satisfied that the act of 1862 does not, by any fair rule of

construction known to the court, warrant it in saying that the words "goods of a similar description," were intended to be extended beyond what they were in the act of 1861, which clearly confined them to goods woven, gray and uncolored, and afterwards printed or dyed.

"I think, therefore, that the construction given to it by the Secretary of the Treasury in his letter of 20th March, 1863, is erroneous, and the first one given to it by the Custom-house department, in New York, was the true one, and ought to have been followed.

"The verdict ought to be for the plaintiffs."

The jury returned a verdict for the plaintiffs, and the court
24 granted to the defendant time to make a bill of exceptions; and because the several matters aforesaid and the said exceptions do not appear by the record of the verdict, his honor, the judge, at the request of the counsel for the defendant, has set his seal hereto, as a bill of exceptions, on this twenty-eighth day of December, 1867.

[SEAL.] (Signed) D. A. SMALLEY, *Judge.*

25 "A."

TREASURY DEPARTMENT, *March* 20, 1863.

SIR: On certain merchandise imported by Charles Stoddard and J. S. Lovering, and others, you assessed a duty of two cents per square yard, and thirty per cent. ad valorem, under the clause in section 9 of the tariff act of July 14, 1862, which levies an additional duty of two cents per square yard, as follows:

"On all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted, wool, mohair, or goat's hair, and on all goods of similar description, not exceeding in value forty cents per square yard."

Mess. Stoddard & Lovering claim that the goods in question should be assessed at the rate of thirty-five per centum ad valorem, as "manufactures of mixed materials, not otherwise provided for;" other importers of like goods claim that the proper classification should be as "other manufactures of worsted goods, or of which worsted shall be a component material, not otherwise provided for;" others, again, as "manufactures not otherwise provided for, composed of mixed materials, in part of cotton, wool, silk, &c.;" and "that the goods in question are not 'similar to delaines'"

The clause of section 9 of the tariff act of July 14, 1862, above quoted, provides for every description of delaines, whether
26 dyed or printed, plain or twilled. It says "on all delaines, &c.," and "on all goods of similar description, not exceeding in value forty cents per square yard."

The question now arises, what constitutes "similar description?" I am of the opinion, that all goods composed of the same materials, and used for the same purpose as a "delaine," must be treated as of "similar description."

No line of demarcation can be drawn between one class of ladies dress fabrics, composed of the materials named in the section quoted, and another, that will ensure a satisfactory degree of uniformity throughout the country.

In this opinion a majority of the experts of the customs, to whom the subject has been refered, agree.

Your decision is hereby affirmed.

I am, very respectfully,
(Signed) S. P. CHASE,
Secretary of the Treasury.

To J. F. GOODRICH, Esq.,
Collector, &c., Boston, Mass.

27 UNITED STATES OF AMERICA, *ss*:

To C. F. SCHMIEDER and C. E. SCHMIEDER, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 1st Monday of December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the southern district of New York, wherein Hiram Barney is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 30th day of November, in the year of our Lord one thousand eight hundred and sixty-seven.

SAM'L BLATCHFORD,
District Judge of the United States for the southern district of New York.

28 Endorsed: "Due service of a copy of within citation is hereby admitted. Dated Nov. 30, 1867. A. W. Griswold, plff's att'y."

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In the Supreme Court of the United States.

DECEMBER TERM, 1869.

HIRAM BARNEY, *Collector of the Port of New York, Plaintiff in Error,*
vs.
C. F. SCHMEIDER, *et al.*
No. 70.

In Error to the Circuit Court of the United States for the southern district of New York.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT.

This is a writ of error to the circuit court of the United States for the southern district of New York, dated the 30th day of November, 1867, and returnable on the first Monday of December, 1867.

The declaration does not allege that the parties are citizens of different States, or that the suit arises under the revenue laws of the United States, or is against an officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, within the 2d and 3d sections of the act of March 2, 1833, (4 Stat., 632;) it contains only the common counts. The defendant pleads *non assumpsit.* There is no *similiter;* the case is tried by a jury, the verdict is for the

plaintiffs; dâmages are assessed at $11,002\frac{84}{100}$, with costs amounting to $637\frac{46}{100}$, for which judgment is rendered on the 30th day of November 1867, (pp. 1, 2, and 3, printed transcript,) and exceptions are allowed and sealed by the judge, (printed transcript, p. 12.) In these exceptions, the charge of the judge is set out at length, by which it appears that the judge directed the jury to find a verdict for the plaintiffs, and that "the testimony taken on a former trial has, with the consent of both sides and the approbation of the court, been put in. It is very voluminous. It has not been read before this jury, nor was it necessary that it should be, for it was delivered in the hearing of the court only a few days since, and is very fresh in its recollection. There is very little discrepancy in the testimony."

ARGUMENT.

I.

If, in a case on trial before a jury, there is no competent evidence on which a jury can lawfully render a verdict for the plaintiff, then, when the plaintiff has put in all his evidence, the defendant has a right to ask the court to rule that there is no evidence that will warrant a verdict for the plaintiff, and that the verdict of the jury must be for the defendant, and to this ruling the plaintiff can except. But for the court to direct the jury to bring in a verdict for the plaintiff *is error*. If there was any competent evidence in the case, it should

have been submitted to the jury, under proper instructions from the court, upon the law applicable to it.

The case was not submitted to the court without a jury, pursuant to the 4th section of the act of March 3, 1865. (13 Stat., 501.)

United States *vs.* Laub, 12 Pet., 5.
Park's Admrs. *vs.* Ross, 11 How., 362.
Schuchardt *vs.* Allens, 1 Wall., 359.

II.

If the defendant offered evidence which was excluded by the presiding judge, to which he excepted, then there should have been such a statement of the case, and of the defendant's offers of evidence, and the judge's rulings thereon in excluding it, and the defendant's exceptions to such rulings, as would bring before this court intelligibly the question of the correctness of these rulings.

It does not appear when the duties were paid, or when the suit was brought. By the "case and exceptions," beginning on page 5 of the printed transcript, I do not understand an agreed statement of facts. It is not signed by the parties or their attorneys, and I understand it to be only such a statement of the case by the judge as was thought necessary to make his rulings intelligible; and when, in the exceptions, it is said "the evidence showed," &c., I do not understand that what it is said the evidence showed was admitted to be a fact, but only that there was some evidence

tending to prove that such was the fact, or perhaps that the judge thought the evidence sufficient to establish it.

In these exceptions, it first appears that the suit was brought by merchants in New York against the collector of customs of that port to recover customs duties alleged to have been illegally exacted from them by him; that the importations were made between the 24th of June, 1863, and the 24th of March, 1864, and the merchandise entered, but whether for warehousing or consumption is not stated, and that subsequently the duties were exacted. Whether, when these duties were paid, the 5th section of the act of March 3, 1857, (11 Stat., 195,) or the 14th section of the act of June 30th, 1864, (13 Stat., 214,) was the law regulating suits of this character, is not certainly known; but from the seventh and eighth requests of the defendants for instructions on pages 7 and 8, I assume that the duties were paid, the appeals taken, if any were taken, and the suit brought before the passage of the act of June 30, 1864.

On page 5, printed transcript, are found these words, viz: "The evidence then showed that said appeals were made within the time prescribed by law for that purpose, and in the manner above stated, and that no answer to said appeals had been received by said plaintiffs or their attorneys."

Can a suit be maintained under the 5th section of the act of March 3, 1857, when no decision on an appeal has been made by the Secretary of the Treasury? That

Congress has a right to pass a law preventing an importer from maintaining an action of *assumpsit* against a collector of customs to recover duties alleged to have been exacted from him on his importations, excessive in amount, seems settled. *Cary et al. vs. Curtis*, 3 Howard, 236, and *Curtis' administratrix vs. Fiedler*, 2 Black, 461. If Congress can do this, it can regulate the terms on which an action of *assumpsit* to recover such duties can be maintained, and can provide that no action shall be maintained except in the manner it prescribes.

The 5th section of the act of March 3, 1857, provides that the decision of the collector shall be final, "unless the owner, importer, assignee, or agent, shall, within ten days after such entry, give notice to the collector in writing of his dissatisfaction with such decision, setting forth therein, distinctly and specifically, his grounds of objection thereto, and shall, within thirty days after the date of such decision, appeal therefrom to the Secretary of the Treasury, whose decision on such appeal shall be final, and the said goods, wares, and merchandise shall be liable to duty or exempted therefrom accordingly, any act of Congress to the contrary notwithstanding, unless suit shall be brought within thirty days after such decision for any duties that may have been paid or may thereafter be paid, or within thirty days after duties shall have been paid, in cases where such goods shall be in bond."

The Secretary of the Treasury had, on the 20th of March, 1863, given an opinion on the same question as

arose in this case, but had made no decision upon the appeals of the plaintiffs. Such a decision, except as required by the statute, in this case was unnecessary, as the opinion of the department was known; but it is submitted that the language of this 5th section requires a decision on an appeal before suit can be brought.

III.

The 13th section, and the third paragraph thereof, of the act of March 2, 1861, (12 Stat. 184, 185,) provided that, from and after the first day of April, 1861, there should be levied, collected, and paid on the importation of "all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of wool, gray or uncolored, and *on all other gray and uncolored goods of similar description*, twenty-five *per cent. ad valorem;* on bunting and on all stained, colored, or printed, and all other manufactures of wool, or of which wool shall be a component material, not otherwise provided for, thirty *per cent. ad valorem.*" Under this statute, it is, I think, conceded that the importations of the plaintiffs were dutiable at thirty *per cent. ad valorem*, either as a "manufacture of wool or of which wool shall be a component material," or as one of the manufactures named in the 22d section of the same act.

The ninth section, and the eleventh and twelfth paragraphs thereof, of the act of July 14, 1862, (12 Stat., 552–3,) imposed, in addition to the duties theretofore imposed by law "on all delaines, cashmere

* "wool" changed to "worsted" by 6 sect. ch. 45, 1864; 12 Stat. 294.

delaines, muslin delaines, barege delaines, *composed wholly or in part of worsted, wool, mohair, or goats' hair*, and *on all goods of similar description*, not exceeding in value forty cents per square yard," a duty of "two cents per square yard," "on bunting, worsted yarns, and all other manufactures of worsted or of which worsted shall be a component material, not otherwise provided for, five per cent. *ad valorem*." After the passage of this act, the plaintiffs contend their importations were liable to an additional duty of five per cent. *ad valorem*, (making, in all, a duty of thirty-five per cent. *ad valorem*,) as manufactures of worsted or of which worsted is a component material, not otherwise provided for, by the act of July 14, 1862. The defendant contends that the importations of the plaintiffs, in addition to the duty of thirty per cent. imposed by the act of 1861, were liable, under the act of 1862, to pay a duty of two cents per square yard, as *goods of a similar description to delaines, cashmere delaines, muslin delaines, barege delaines*, composed wholly or in part of worsted, wool, mohair or goats' hair. It is conceded that the goods did not exceed forty cents per square yard in value. The evidence seems to have been, that all delaines, cashmere delaines, muslin delaines, and barege delaines, are fabrics composed of worsted, or of worsted and cotton woven in the gray or uncolored state, that these gray or uncolored delaines, are sent to the printer's, where they are bleached, and then dyed, colored,

or printed, by passing them between rollers or cylinders; that the goods of the plaintiffs were usually called Saxony woven goods, or Saxony woven dress goods, and were made of worsted yarn or of worsted and cotton yarn, dyed in the skein, and woven upon a loom, by using as many shuttles as there are different colors in the weft of the fabric, and are ready for the market when they come from the loom, after folding and pressing, (printed transcript, pp. 4, 5;) that these Saxony dress goods are composed of the same materials and are used for the same purposes as delaines but, at the time of the passage of the acts of Congress before mentioned, had never been manufactured in the United States, although delaines, cashmere delaines, muslin delaines, and barege delaines had been, (printed transcript p. 6;) that although the goods in question were of the same material as delaines, and were used for the same purpose, namely, ladies and childrens' dresses, (printed transcript, p. 8,) "the testimony showed a diversity of opinion among importers, wholesale merchants, jobbers, and manufacturers on this single question, whether they are or are not goods of a similar description to delaines." (printed transcript, pp. 8, 9.)

The judge refused the nine requests for instructions made by the counsel for the defendant, (printed transcript, pp. 6, 8,) and the counsel for the defendant excepted especially to the following words, in the charge of the judge, (printed transcript, p. 11:) "I am satisfied

that the act of 1862 does not, by any fair rule of construction known to the court, warrant it in saying that the words 'goods of a similar description,' were intended to be extended beyond what they were in the act of 1861, which clearly confined them to goods woven, gray or uncolored, and afterwards printed or dyed." Unless, therefore, the words "goods of a similar description," in the 11th paragraph of section 9, of the act of 1862, (12 Stat., 553,) must as a matter of law, be limited to goods woven in the gray or uncolored state, as the words expressly are in the third paragraph of the 13th section of the act of 1861, the charge of the judge was erroneous. No question is made here of the correctness of the rulings in denying the first, fourth, seventh, and ninth prayers of the defendant.

The paragraph heretofore cite
relates to delaines composed wh
gray or uncolored, and to bur
colored, printed, or other man
which wool shall be a component
provided for. By the 22d section of the act of 1861, "manufactures not otherwise provided for, composed of mixed materials, in part of cotton, silk, wool, or worsted, or flax, * * * manufactures of cotton, linen, silk, wool, or worsted, if embroidered, &c., not otherwise provided for, * * * manufactured of goats' hair or mohair, or of which goats' hair or mohair shall be a component material, not otherwise provided for * * were dutiable at 30 per cent. *ad valorem*. The para-

or printed, by passing them between rollers or cylinders; that the goods of the plaintiffs were usually called Saxony woven goods, or Saxony woven dress goods, and were made of worsted yarn or of worsted and cotton yarn, dyed in the skein, and woven upon a loom, by using as many shuttles as there are different colors in the weft of the fabric, and are ready for the market when they come from the loom, after folding and pressing, (printed transcript, pp. 4, 5;) that these Saxony dress goods are composed of the same materials and are used for the same purposes as delaines but, at the time of the passage of the acts of Congress before mentioned, had never been manufactured in the United States, although delaines, cashmere delaines, muslin delaines, and barege delaines had been, (printed transcript p. 6;) that although the goods in question were of the same material as delaines, and were used for the same purpose, namely, ladies and childrens' dresses, (printed transcript, p. 8,) "the testimony showed a diversity of opinion among importers, wholesale merchants, jobbers, and manufacturers on this single question, whether they are or are not goods of a similar description to delaines." (printed transcript, pp. 8, 9.)

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The paragraph heretofore cited from the act of 1861 relates to delaines composed wholly or in part of wool, * worsted gray or uncolored, and to bunting and any stained, colored, printed, or other manufacture of wool, or of which wool shall be a component material, not otherwise provided for. By the 22d section of the act of 1861, "manufactures not otherwise provided for, composed of mixed materials, in part of cotton, silk, wool, or worsted, or flax, * * * manufactures of cotton, linen, silk, wool, or worsted, if embroidered, &c., not otherwise provided for, * * * manufactured of goats' hair or mohair, or of which goats' hair or mohair shall be a component material, not otherwise provided for * * were dutiable at 30 per cent. *ad valorem*. The para-

* worsted 12 Stat. 294.

graph relating to delaines, in the act of 1862, is not confined to delaines, &c., composed wholly or in part of wool, but expressly includes delaines, &c., composed wholly or in part of worsted, mohair, or goats' hair, as well as of wool. It is not confined to gray or uncolored delaines, as is the first clause of the paragraph in the act of 1861, but extends to all delaines composed wholly or in part of the materials named, *whether printed, or gray* or *uncolored*. Under the act of 1861, a printed delaine was probably dutiable under the last clause of the paragraph, as a printed manufacture of wool, or of which wool was a component material, not otherwise provided for. Under the act of 1862, a printed delaine was dutiable, not *as a manufacture of worsted, or of which worsted shall be a component material, not otherwise provided for*, but as a *delaine* composed wholly or in part of worsted. The paragraph on delaines, in the act of 1862, is broader than the first clause of the paragraph in the act of 1861, not only in including other component materials of the fabrics, but in including colored or printed delaines.

Under the act of 1862, the delaines described in the 11th paragraph were subject to an additional duty of two cents per square yard, whether they were dutiable, under the act of 1861, at 25 per cent *ad valorem*, under the first clause of the third paragraph of the 13th section, or at 30 per cent. *ad valorem*, under the second clause of the same paragraph, or at 30 per cent. *ad valorem*, under the 22d section of the same act.

The phrase "goods of a similar description," in the 11th paragraph of section 9, of the act of 1862, must mean goods of a description similar to those named previously in the paragraph, and the delaines therein named must be held to include printed or colored delaines, as well as gray or uncolored delaines. In this paragraph of the law of 1862, the words "gray or uncolored," occurring in the third paragraph of the 13th section, of the act of 1861, were omitted for some purpose. That purpose plainly was, to give the paragraph a more extended meaning than belonged to the first clause of the third paragraph of the act of 1861. It was, therefore, error to rule absolutely, as a matter of law, that no merchandise could be comprehended within the meaning of the words "all goods of a similar description," in the 11th paragraph of the 9th section of the act of 1861, unless the merchandise was woven in a gray or uncolored state.

IV.

The question, then, was, whether the merchandise imported was of a similar description to either delaines, cashmere delaines, muslin delaines, or barege delaines, composed wholly or in part of either worsted, wool, mohair, or goats' hair, whether colored or uncolored, printed or gray; and it was for the court to instruct the jury what constituted the similarity of descrip-

tion required by this section, and for the jury to find, under these instructions, as a fact, whether the merchandise imported was or was not of this similarity of description; and the court erred, not only in charging the words excepted to on the bottom of page 11 and the top of page 12 of the printed transcript, but also erred in refusing the second and third prayers of the defendant. (Printed transcript, p. 7.)

The 20th section of the act of August 30, 1842, (5 Stat., 565,) provides "that there shall be levied, collected, and paid on each and every non-enumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any enumerated article chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned," with a provision that if any non-enumerated article equally resembles two or more enumerated articles, dutiable at different rates, it shall pay the highest rate. Field *vs.* Schell, 5 Blatchford, C. C. Rep., 1, and cases therein cited.

If the merchandise of the plaintiffs is of a similar description to delaines, &c., within the meaning of the 11th paragraph of the 9th section of the act of 1862, it is provided for by the act, and the 20th section of the act of 1842 is only referred to for the purpose of showing what the similitude is, in the opinion of Congress, which makes goods of a similar description to other goods, and

that is, a similitude, either in material, quality, texture, or the use to which they may be applied.

In revenue laws, unless it appears from the act itself, or from other acts relating to the same subject, that a particular meaning was intended by a term descriptive of merchandise used in the act, it is held that the word must be interpreted according to its common commercial meaning and use in our trade. *Two Hundred Chests of Tea*, 9 Wheat., 430; Elliot *vs.* Swartwout, 10 Peters, 137; Maillard *vs.* Lawrence, 16 Howard, 251; Rossevelt *vs.* Maxwell, 3 Blatchford, C. C. Rep., 391.

It should have been left to the jury to determine whether the goods imported "were goods of a similar description" to delaines, according to the commercial classification of goods, and the commercial understanding of those terms when the act of 1862 was passed.

V.

In reference to the correctness of the fifth and sixth requests for instructions made by the defendants, see Belcher *vs.* Linn, 24 How., 508.

E. R. HOAR,
Attorney General.
W. A. FIELD,
Assistant Attorney General.

Supreme Court of the United States.

HIRAM BARNEY, PLAINTIFF IN ERROR, *vs.* C. F. SCHMEIDER ET ALS.

Brief presented by C. L. WOODBURY, counsel in certain cases in District of Massachusetts, continued to abide the decision of the above case: —

May it please your honors:

It is not to be denied that these Saxony dress goods are appropriately classed under the thirty-five per cent clause as manufactures of worsted, unless some other controlling clause excludes them; the plaintiff proposes to find this in the item "all delaines, cassimere, muslin, barège delaines, and goods of similar description."

The evidence shows our goods are not known as delaines in commerce, but are called Saxony dress goods. The appraisers were not dissatisfied with the commercial name. The classification of the goods is the legal duty of the collector after the appraisers have examined them. It is not known that the appraisers interfered in the classification, nor would it change the situation; for neither the appraisers nor the collector have any *judicial* force as legislative referees attached to their decisions when they are rendered under the direction of the Secretary of the Treasury, whose decision when made the law compels them to follow irrespective of their individual opinions. Their functions were ministerial and not judicial here, because the Secretary of the Treasury, in his letter of March 20th, 1863, decided the question, and the local officers were bound by law to follow his decision, and did so.

The commercial name or denomination being with us, the plaintiff cannot recover in this case unless he shall satisfy the Court that in the clause in the statute the noun description is to be interpreted as if it were the noun use, or as if the words "of use" were added so as to read "goods of a similar description of use." The interpretation of the statute is exclusively in the province of the Court, and if its language is clear and unambiguous, experts cannot aid the Court in their duty of construction.

In the use of language, the statute should be its own interpreter so far as possible. An analysis of the statute shows that where Congress meant "use" as the test of classification it

said so, and where it said manufactures or articles of like description, or employed the word "description" in such a connection, it meant the articles or manufactures should be of the like description, and not "the like description of use."

In the following cases in that statute of 1862, Congress has in precise language made *the similarity of use* the test for classifying — 12 Stat. at large.

P. 547 — copal, kowrie, damar, and all gums *used for like purposes.*

P. 548 — petroleum . . . other bituminous substances *used for like purposes.* Lastings, etc., made in patterns of such size, shape, and form, or cut in such a manner as to be fit for shoes, slippers, boots, bootees and buttons exclusively.

P. 551 — acorn coffee, dandelion root, and all other articles used or intended *to be used as coffee* or a substitute for coffee.

— Garden seeds, and all other seeds for agricultural and horticultural purposes.

— Gunpowder, and all other explosive substances *used for* mining, blasting, artillery or sporting purposes.

P. 552 — percussion caps, fulminates, and all other articles *used for like purposes.*

P. 554 — on cotton bagging, and other manufactures *suitable to the uses* to which cotton bagging is applied.

When Congress intend to classify by the description of the manufacture, they employ the word "description" in a proper connection for that purpose, as the following extracts illustrate.

P. 544 — cordials, similar spirituous beverages.

P. 545 — *band and hoop iron, and all other descriptions* of rolled or hammered iron.

P. 546 — cast-iron pipes, provided that the following descriptions of iron, manufactures of iron, manufactures of steel, files, rasps, and floats of all descriptions.

P. 552 — veined marble, and marble of all other descriptions.

P. 550 — starch of all descriptions.

P. 555 — chalk of all descriptions.

— No looking-glass plates framed shall pay less than similar glass of like descriptions.

P. 556 — needles, sewing, darning, and all other descriptions; oil-cloth of every description; side arms of every description.

— In the textile manufactures, the same application of the description is uniformly made textile manufactures.

P. 552 — all manufactures of wool of every description; on goods of like description valued at over one dollar, etc.

P. 553 — on flannels of all descriptions. On woollen and worsted yarn of all descriptions; on clothing ready made, and wearing apparel of every description; on blankets of all

kinds. Provided that balmoral skirts or goods of like description, or used for like purposes. On all delaines etc.; and on all goods of a similar description; on bunting, worsted yarns, and all other manufactures of worsted, not otherwise provided for.

P. 553 — on all manufactures of cotton not colored, not exceeding one hundred threads to the square inch; on finer or lighter goods of like description, not exceeding one hundred and forty threads, and on all goods except ginghams and plaids, and goods of like description. On cotton jeans, denims, drillings, bed-ticking, ginghams, plaids (these are woven in colors), and goods of a like description.

P. 556 — clothing and wearing apparel of whatever description, etc.

These are all the instances where the word description is used for purposes of classification, and in no instance does it appear to mean description of use, but always description of the manufacture or material. One remarkable instance shows that Congress thought the word description did not, and ought not convey the idea of a similar use; p. 553, provided balmoral skirts, or goods of like description, or used for like purposes. This we think is conclusive that when they said "goods of like description," it did not refer to *the use*, and that to make a classification by the use of the goods they always employed the words "used for like purposes," or some equivalent phrase referring to some particular or general use by which the classification should be determined. There is no ambiguity nor confusion in their mode of applying these phrases in this statute in any case. The description as to delaines stands on a like footing with the nine examples, and is governed by the one sound principle of interpretation.

In the delaine item, the adverb "similar" is affixed to the word description; in the other items, "like" is generally, though not always used. The adverb "similar" has a more restricted sense than "like," and requires the closest approach to the standard set up. The interpretation by the treasury department of the words "similar description" that they meant "all goods composed of the same materials and used for the same purposes as delaine" assumes that Congress intended to refer to the use of fabrics for ladies' dresses by its language, instead of affixing duties on various fabrics, by their description as manufactures. The comparison of the language of various items in the statute does not sustain this assumption. Were the word "description" wherever it occurs in that statute to be interpreted as the Treasury assume, the wildest confusion would reign, instead of the orderly classification which follows by the descriptions of manufacture and material which Congress have sought to establish and promulgate. Thus cotton goods, uncolored, are described as a separate class from those like plaids, ginghams and tickings, which are woven of colored yarns and figured in the loom; and printed or colored cottons are put into still another class. It is thus, also, that worsted manufactures similar to delaines go into one class, and bunting and all other manufactures of

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worsted into another class. The use is not the test of class in any of these instances. And still another instance, Congress distinguishes between "manufactures of wool" and "manufactures of worsted," though both the wool and worsted fibres grow on the same sheep, and are used for men and women and children's dresses, etc.

These illustrations for the construction of the statute show that the definition of the Treasury Department, relied on by the plaintiff, will not meet the evident intention of Congress in framing the statute, and are inadmissible as a rule of interpretation.

Looking at the two clauses in question, we may find the rule Congress intended to prescribe. The delaine item is not based on "materials," as the statute distinctly includes woollen worsted, mohair, or goat's hair, as materials from which the goods may be made. What is there which makes a particular description for "all delaines" (a technical trade name frequently expressed as all wool delaines), cassimere, muslin, barège delaines, entering into the character and manufacture of each? They are all woven in the gray or uncolored, and have, after leaving the manufacturer's hands, to be sent to the print works of the dyer, there be colored or figured by the printing process, and dressed, prepared and packed for market. There is also a large class of goods known as Persians, Challies, Amures and Coburgs, which are "woven in the gray" and printed afterwards and dressed in the same way, and are admittedly goods of a similar description. This description has been recognized in the Act of 1861, which says, "on all delaines, — cassimere, muslin and barège delaines — composed wholly or in part of (wool) worsted, gray or uncolored, and on all other gray or uncolored goods of similar description." There is no use for gray delaine, except to have them printed; they are not worn in the uncolored state.

Congress had this characteristic fully in their mind, and had given it a revenue sense. In 1862 they carried the colored or printed delaines into the same class with the unprinted, and the similarity of the two arose from each being originally woven in the gray and afterwards printed or dyed, and dressed for market. We contend that this being "woven in the gray," the element in these goods, where similarity exists, is the test for classification under that item of the statute. A consideration of the second item, "bunting, etc.," enforces this view. Bunting is both woven in the gray, and woven in colors; all other manufactures of worsted not otherwise provided for are carried into a separate class from these goods woven in the gray, and pay a different rate. We also have a generic class for "all manufactures of wool of every description made wholly or in part of wool, not otherwise provided for." These two last cover the whole field of woollen worsted manufactures, and unless expressly excepted by some special clause, every manufacture of these materials would be included. It is already shown what is the similar description of manufacture that makes the goods woven in the gray all of one family, whether printed or not, also that the similar description referred to is of manufacture.

Unless some other controlling similarity of description can be shown besides this of being "woven in the gray," how can the special and restricted language of the delaine clause be expanded by construction to absorb the generic classifications of manufactures of wool and worsted to which it is in fact an exception?

The statement of facts shows no other controlling similarity among the delaines, and we must insist that this is the true test of the special class headed by all delaines in the act of 1862, as it was in the act of 1861.

Are the defendants' goods of a similar description to delaines?

The verdict of the jury, and the concessions of the agreed statement of facts, coincide that these goods are not of a similar description as goods. The processes by which they are made differ from each other materially, employing artisans of different divisions of art, and machines of different construction, going through processes, the most of which are radically different; and in the end the goods themselves are dissimilar in appearance, finish and capacity for use. A brief capitulation of the distinctions in process in making a figured or plaid delaine and a Saxony dress goods piece, of the same figures, will show how wide they are apart.

Delaines.	Saxony dress goods.
Spinning.	Spinning.
No process for dying yarns in the hank.	A process for dying yarns in the hank.
Are made of gray or uncolored yarns for warp and filling.	Are made of colored and dressed yarns for warp and filling.
Are woven in a plain loom.	Are woven in a plaid or Jacquard loom.
With one shuttle.	Usually with several shuttles.
	Each carrying a special color, and arranged shuttle boxes and several heddles.
When the goods leave the loom, they are not ready for market.	The goods are ready for market when they leave the loom.
The goods are sent to the print works to be printed or dyed.	Except being crabbed and steamed to make a brilliant and soft surface.
The engravers copy the artist's design on copper rollers.	No engravers are employed.
The dyers make the colors.	No printing rollers or machines.
The printer prints the goods with his machines.	No print works or printers.
The goods are chemically treated with mordants.	No treatment like this of the goods.

Then aged and steamed and pressed.	The goods are crabbed and pressed.
The aging, steaming, etc., is a different process from that required for Saxony goods.	A different process than that required for delaines, one that printed delaines could not stand.

The operatives employed to make the goods belong to different arts, and cannot perform each other's duties.

Different skill or branches of weaving.	Skill in arranging colors to make figures.
Looms differ.	Usually looms differ.
Engravers and printers.	No engravers or printers.
Dye setters.	Or dye setters to dye the cloth.
No crabbing machines.	Crabbing machines.
A different steaming in a different machine.	A different steaming.

The goods themselves are not alike.

The product is printed on one side.	Equal figures in reversed colors on each side are woven.
The other side is not fit to be exposed for wear, blurred surface.	Either side can be worn outwards.

The surfaces of the goods are distinguishable by sight and touch to experts.

The surfaces of these goods are distinguished by sight and touch by the expert equally as well as by the names they bear in the trade; not even in the appropriate field for use are these goods similar. The Saxony, presenting figures on both sides, appears to court the choice of the prudent matron, who sees economy in its capacity to be turned and still appear fresh; while the figured delaine, like the gaudy and slimsy calico, seems meant for show, and soon to be replaced by a new dress, because it cannot be turned. The mode of finish agrees with this. The Saxony, a substantial, solid finished manufacture of worsted; the other, a slazy, temporary and gaudy, girlish concern, with superficial colors and finish to correspond. More striking dissimilarity in the field of textile fabrics than the process of making these goods cannot be found among the entire number of classes into which the tariff of 1862 divided them.

The statement of facts discloses that, at the date of these tariff acts, delaines uncolored and printed were made in this country largely, but Saxony dress goods were not. A reference to all the tariff acts since the policy of protection entered into the consideration of the makers of revenue laws shows that they have at times protected a home made article against the competition of the same article made abroad; but no instance can be cited where they have undertaken to protect a home made article from the competition of a dissimilar article from a foreign

country. Protection is not extended to woollens from the competition of cotton and silk manufactures, nor to imitations of champagne against the real wine, nor to wheat against farina, nor manufactures of iron against steel, brass or aluminum. Congress filled the measure of their usual protection to printers and manufacturers when they protected American gray and printed delaines against foreign ones. The statute of 1862 shows no intention of going further. No manufacturer has ever yet asked that his branch of art should be protected against the competition of other arts, nor has Congress ever attempted so to limit the march of improvement in the useful arts in any instance, much less in this one. In the class of items where Congress has made the use or purpose of the article the test for a revenue classification, it has evidently been for the sake of revenue, and not for any purpose of promoting one product above another. There is no doubt that the Saxony dress goods are included in the "manufactures of worsted" clause, and no good reasons exist to ground an implication of its transfer to any other item.

All which is respectfully submitted,

CHARLES LEVI WOODBURY.

Supreme Court of the U. S.

HIRAM BARNEY,

Plaintiff in Error,

against

C. F. SCHMIEDER, *et. al.*

Defendants in Error.

BRIEF

FOR DEFENDANTS IN ERROR.

A. W. GRISWOLD,

WM. M. EVARTS,

Of Counsel for Defendants in Error.

NEW YORK:

EVENING POST STEAM PRESSES, 41 NASSAU ST. COR. LIBERTY.

1870.

Evening Post Steam Presses, 41 Nassau St., cor. Liberty, N. Y.

Supreme Court

OF THE UNITED STATES.

HIRAM BARNEY,
Plaintiff in Error,

agst.

C. F. SCHMIEDER *et al.*,
Defendants in Error.

Brief for Defendants in Error.

The phrase or words "*goods of a similar description*," as used in the 13th section of the Tariff Act of 1861, and the 9th section of the Act of 1862, are limited and confined to *gray or uncolored goods*, or goods which are woven in *the gray*, and are not applicable to goods woven in colors.

12 Stat. at Large, p. 185.

In the 3d clause of section 13 of the Act of 1861, the word *wool* is used, and by the Act of August 5th, 1861, the word *wool* is struck out and the word *worsted* inserted.

12 Stat. at Large, p. 294.

By section 13 of the Act of 1861, on all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted, *gray or uncolored, and on all other gray or uncolored goods of a similar description*, a duty of twenty-five per centum *ad valorem* is imposed.

It must be conceded that the phrase *similar description*, as here used, is limited and confined to *gray or uncolord goods.* On this point there is and can be no room for doubt.

"Expressio unius exclusio est alterius."

But how is the remaining portion of this clause of the section to be read?

I mean the words, "on bunting, *and on all stained, colored or printed*," and on all other, &c.

On bunting—that is plain enough. It is liable to a duty of 30 per cent. *ad valorem;* but what does "*on all stained, colored or printed*" refer to?

"*Stained, colored or printed*" what? What goods are there which are composed wholly or in part of worsted which are *stained, colored or printed?*

Certainly not Saxony woven dress goods, or any other fabric which is woven in colors; those are not *stained, colored or printed*, according to any mercantile or manufacturer's sense of the terms.

Nor can the words "*stained, colored or printed*" refer to the subsequent clause of the section, viz.: *and on all other manufactures of worsted*," &c., because the intervening conjunction "*and*" forbids such a construction.

There can be but one sensible interpretation of these words. The record shows that there are gray or uncolored delaines, and also that there are *stained, colored or printed* delaines, and these words "stained, colored or printed," must refer to "all delaines, cashmere delaines, muslin delaines, barege delaines, &c.," mentioned in the first part of the paragraph—and the clause should be read as follows: "And on all," (the above goods when) "*stained, colored or printed*, and on all other manufac-

tures of worsted, or of which worsted shall be a component material, not otherwise provided for, thirty per cent. ad volorem.

Congress, while protecting the home manufacture of the whole family of delaines, intended to discriminate in favor of the importer of the *gray* or *uncolored* goods which would furnish employment for our American print works, and hence admitted the gray or uncolored goods at a lower rate of duty than was imposed on the stained, colored or printed goods. And goods woven in colors like plaintiff's were always returned under the last clause of the section, viz.: " and on all other manufactures of worsted, or of which worsted shall be a component material, not otherwise provided for, 30 per cent. *ad valorem.*"

See Record p. 4.

Supposing we have found the correct interpretation of this section of the Act of 1861. Let us see if the 9th Section of the Act of 1862 varies, repeals or modifies it.

The Act of July 14th, 1862, is an Act *in addition* to the Act of 1861.

The first clause of the 9th Section reads as follows: " That *in addition* to the duties heretofore imposed by law on the *articles hereinafter* mentioned and included in this Section, there shall be levied and paid on the goods, wares and merchandize herein enumerated and provided for, imported from foreign countries, the following duties and rates of duty, that is to say, &c., &c., on all delaines, &c., 2 cents a square yard; on bunting, &c, 5 per ct. *ad valorem.*"

12 Statute at L., 553.

It must be admitted that the duty provided for in this Section can only be levied in *addition* to the rate heretofore provided for by law for the same goods, hence the necessity of reading the 13th Section of the Act of 1861 with the 9th Section of the Act of 1862. And in order to determine whether Congress intended, in the

latter, to modify the general provisions of the former, we must see if we can find any changes in the structure of the Act of 1862 to indicate such an intention.

And in the first place let us compare the language of the 3d clause of the 13th section of the act of March 3d, 1861, with the language of the corresponding clause in the 9th section of the act of July 14th, 1862.

Act of March 3d, 1861, § 13, *paragraph 3d*, 12 *Stat. at L., p.* 185.	*Act of July 14th*, 1862, § 9, 12, *Stat. at L., p.* 553.
On all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted, gray or uncolored, *and on all other gray or uncolored goods of similar description*, twenty-five per centum ad valorem; on bunting and on all [the above goods when] stained, colored or printed, and on all other manufactures of worsted, or of which worsted shall be a component material, not otherwise provided for, thirty per centum ad valorem.	On all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted, wool, mohair or goats' hair, and on all goods of similar description, not exceeding in value forty cents per square yard, two cents per square yard; on bunting and on all other manufactures of worsted or of which worsted shall be a component material, not otherwise provided for, five per cent. ad valorem.

It will be observed that the terms "gray or uncolored," and "stained, colored or printed," are omitted in this section, and it is claimed by the plaintiff in error that inasmuch as Congress, in the act of 1862, omitted the terms "gray or uncolored," and also "stained, colored or printed," employed in the act of 1861, it is evidence of its intention to enlarge the application of the

words " goods of a similar description " beyond the scope they were limited to in the act of 1861, and by that enlarged application of these words the goods embraced in the last clause of the 13th section of the act of 1861, viz., " and all other manufactures of worsted or of which worsted shall be a component material, not otherwise provided for," are now embraced within its operation.

We have already observed, that the act of 1861, §13, limits the application of the term " goods of similar description " to gray or uncolored goods, or to goods woven in the gray or natural color of the worsted or worsted and cotton.

Now, *did* Congress intend by the omission of the words " gray or uncolored " and " stained, colored or printed," to enlarge the application of these words " goods of a similar description " beyond the scope they were limited to, in the act of 1861?

What is the meaning of the term " and on all goods of a similar description," as used in the act of 1862? Similar description to what? Why the plaintiff in error says to all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted, wool, mohair or goats' hair; but there are surely two descriptions of these several kinds of delaines according to the record, viz.: " gray or uncolored" delaines and " stained, colored or printed" delaines, upon which two different rates of duty were imposed; and to which of these two classes shall the term " and on all goods of a similar description," apply? To the " gray or uncolored" or to the " stained, colored, or printed?" There can be but one answer. It applies to both. If it applies to both, then Congress, in the Act of 1862, did not intend to destroy or supersede the distinction made in the Act of 1861, between gray or uncolored goods, and stained, colored or printed goods, but intended that the two sections should be read together, in order to determine what *rate* of duty, the two cents a square yard, provided for in the Act of 1862, is in *addition* to For instance, under this section of the

act of 1862, what duty is chargeable on colored or printed delaines not exceeding in value forty cents a square yard,—and what on gray or uncolored delaines, exceeding in value forty cents a square yard?

It will be seen at once that no sensible answer can be given to these questions without going back to the 13th section of the act of 1861, to ascertain what rate of duty was there imposed on colored or printed delaines, and what on gray or uncolored, because it was not the intention of Congress in 1862 to impose the same rate of duty on these two classes of delaines.

We must read the 9th section of the Act of 1862 with the 13th section of the Act of 1861, as follows: "On all "delaines, cashmere delaines, muslin delaines, barege "delaines, composed wholly or in part of worsted, wool, "mohair or goats' hair, gray or uncolored, and on all "other gray or uncolored goods of similar description, "not exceeding in value forty cents per square yard, "twenty-five per centum ad valorem and two cents per "square yard; on the above goods, exceeding in value "forty cents a square yard, thirty per cent. ad valorem; "and on all the above goods, when stained, colored or "printed, not exceeding in value forty cents per square "yard, thirty per centum ad valorem, and two cents per "square yard; on the above goods, exceeding in value "forty cents a square yard, thirty-five per centum ad "valorem; on bunting, and all other manufactures of "worsted, or of which worsted, shall be a component "material, not otherwise provided for, thirty-five per "centum ad valorem."

Is not this a reasonable and practical construction? What other is it susceptible of? It is the one given to it by the Government.

See Ogden's Tariff, 1862, p. 79, and see Record, p. 4, which shows that this construction was given to the section by the Government at the time the Act went into operation, and was so construed and acted upon till

March, 1863, nearly a year, when it was changed by order of the Secretary.

"Contemporanea expositio fortissima est in legem."

Now, are there any changes in other parts of the Act of 1862 to indicate that Congress intended to modify or change the scope or meaning of the language, "goods of a similar description," from what it had under the Act of 1861, so as to embrace within its application the class of ladies' and childrens' dress goods composed wholly or in part of worsted, and known as Saxony woven dress goods, which it is conceded were covered by and embraced in the last paragraph of the third clause of the 13th section of the Act of 1861, which reads as follows:

Act of 1861.	Act of 1862.
Sec. 13, *Clause* 3*d*, *Act of* 1861, 12 *Stat. at L.*, *p.* 185.	*Section* 9 *of Act of* 1862, 12 *Stat. at L.*, *p.* 553.
* * * "and on all other manufactures of worsted, or of which worsted shall be a compo nent material, not otherwise provided for, thirty per centum *ad alorem*."	* * * "and on all other manufactures of worsted, or of which worsted shall be a component material, not otherwise provided for five per centum *ad valorem*."
The 22d section of the Act of 1861, 12 Stat. at Large, p. 192, embraces the following dress fabrics composed of mixed materials, viz.:	The 13th section of the Act of 1862, 12 Stat at Large, p. 557, embraces the corresponding dress fabrics composed of mixed materials, viz.:
Manufactures, not otherwise provided for, composed of mixed materials, in part of cotton, silk, wool, or worsted, or flax.	Manufactures, not otherwise provided for, composed of mixed materials, in part of cotton, silk, wool, or worsted, hemp, jute, or flax.

Manufactures of cotton, linen, silk, wool, or worsted, if embroidered or tamboured, in the loom or otherwise, by machinery or with the needle or other process, not otherwise provided for.	Manufactures of cotton, linen, silk, or worsted, if embroidered or tamboured, in the loom or otherwise, by machinery or with the needle or other process, not otherwise provided for.
Manufacturer of goat's hair or mohair, or of which goat's hair or mohair shall be a component material, not otherwise provided for.	Manufactures of goat's hair or mohair, or of which goat's hair or mohair shall be a component material, not otherwise provided for.

From the foregoing it will be seen, that Congress has used, in the 9th section of the act of 1862, the very same language which is employed in the 13th section of the act of 1861, and which it is conceded, covered the goods involved in this suit.

And if we look at the three clauses in the 22d section of the act of 1861, covering *dress goods* of mixed materials, —and the three corresponding clauses in the 13th section of the act of 1862, we find them so nearly identical that it precludes all possibility of intention on the part of Congress, in the latter act, to change or modify the former, except to add the 5 per cent. duty. They have so employed the same language in its application to the same description of goods in the two acts, as to render any other construction impossible.

Now the record (p. 6) shows that prior to and since the acts of 1861 and 1862 there were fabrics known in trade as Challies, Persians, Amures and Coburgs, which are *similar to delaines*, being made of the same material, woven in the gray or natural color of the worsted, or worsted and cotton, and then dyed, colored or printed. The phrase "*goods of a similar description*," in section 13 of the act of 1861, and in section 9 of the act of 1862, *embraces these goods*, and, consequently, the requirements of these acts are satisfied.

But if the construction claimed by the plaintiff in error be correct, and the words "*goods of a similar description*" cover all fabrics of wool, worsted, mohair, or goats hair, worn for ladies and children's dresses, then the several provisions above referred to would be wholly inoperative in the act of 1862; there would be no goods for them to apply to.

Delaines were first made in this country about 15 years ago, and were first mentioned in the tariff act of 1857, and were christened into the family of printed or dyed fabrics by said tariff act, and in the following language, "all manufactures composed wholly of cotton, which are bleached, printed, painted, or dyed, and delaines, shall be transferred to Schedule C," and under said schedule were liable to 24 pr. ct. duty.

11 Stat. at L, p. 193.

An experience of four years showed the manufacturers that there were a number of fabrics made of the same material, and in nearly the same manner, and were in fact of the same family as delaines, but known by other names than delaines, such as Challies, Persians, Coburgs, Bareges, Cashmeres, Amures, &c.;—and while 24 per cent. duty was levied upon delaines under the act of 1857, these other fabrics came in at 19 per cent., as manufactures composed in part of worsted. And for the purpose of correcting this error or mistake in the act of 1857, Congress in 1861 adopted the language we find in the 13th section of that act. It is broad enough and exactly adapted to *protect the manufacturer of Delaines*, Persians, Challies, Amures, and every other similar fabric woven in the gray or uncolored state, like delaines, and then stained, colored, or printed.

See Record, p. 6.

If Congress employs ambiguous language, so that an article of merchandise may be classed with equal propriety under two different schedules imposing different rates

of duty, that which is least burthensome to the importer should be imposed.

Adams *vs.* Bancroft, 3 Story, 387.

Jesse Hoyt *vs.* Jas. Hall, reported by Hon. Benj. F. Butler to Solicitor of Treasury, and printed in Vol. 2, Ex. Doc, 1st Sess. Ho. of Reps., 26th Cong., Doc. 49, p. 33.

The 5th and 6th exceptions are not tenable.

1st. The appraisers have no power or authority to determine the classification of merchandise ; their duties are confined to appraisement of the dutiable value of imports.

(See several statutes referred to on annexed sheet.)

2d. The record shows that the action of the appraisers in returning the goods in this case as " Manufactures of worsted, or as manufactures of worsted and cotton similar to delaines," had it been within the scope of their authority, would have no binding effect as an official act, because they made such return in pursuance of instructions from the Secretary of the Treasury, of March 20th, 1863, and in direct conflict with their judgment as appraisers and experts, for the record shows that up to March 20th, 1863, or later, appraisers and collectors every where returned these goods as manufactures of worsted at 35 per ct. duty.

(See record, p 4.)

The case of Belcher *vs.* Linn, 24 How., 524–5, does not apply to this case.

The 7th Exception cannot be sustained. If it can be, then it lies with the Secretary of the Treasury to defeat any and every action against Collectors for duties claimed to have been overpaid. He has only to remain silent and decline to answer appeals made to him from the decision of the Collector under § 5, ch. 98, of Act March 3d, 1857, 11 Stat. at Large, 195.

The duties in this case were paid between June, 1863, and March, 1864, and protests and appeals made.
(See Record, p. 4, at bottom.)

No answers were received to the appeals, and plaintiffs' after waiting till January 25th, 1866, more than two years, commenced their suit.
(See Record, p. 2.)

As to the 8th Exception:

The appeals from the decision of the Collector of Customs to the Secretary of the Treasury, provided for in § 5 of the Act of March 3d, 1857, 11th Stat. at Large, 195, is a notice to the Secretary of dissatisfaction with the action or decision of his subordinate, the Collector, and is analogous to a notice of dishonor of a bill or note, or a notice to a tenant to quit, and may be proved, as such notices are by *parol*, without notice to produce the originals.

2 Phillips on Ev. (4 ed.), p. 544 and note, 466.
Lindenberger *et al. vs.* Beall, 6 Wheat. 104.
Johnson *vs.* Haight, 13 John., 470.
McFadden *vs.* Kingsbury, 11 Wend., 669.
Colling & Neweek, 6 Barn. & Cres., 394.,
Fairbault *vs.* Ely, 2 Dev., 66, 71–2.

If the Court shall be of opinion that the appeals cannot be proved by parol, without notice to produce the originals, then the notice to the Attorney of Record, who was the Attorney of the United States, to produce the appeals addressed by the defendants in error to the Secretary of the Treasury, was proper and sufficient to entitle them to offer secondary evidence, because the United States, represented by the Secretary of the Treasury, is the real party in interest, while Barney, the nominal defendant below, and plaintiff in error here, has no